

<b>DIVISION OF MINES</b>	<b>CHAPTER: IV Inspections</b>
<b>PROCEDURES MANUAL</b>	
	<b>PROCEDURE NO: 1.04.09</b>
	<b>ISSUE DATE: January 1, 1997</b>
<b>SUBJECT: Administrative Review</b>	<b>LAST REVISED:</b>
<b>Of Notices Of Violation</b>	

## **OBJECTIVE AND INTENT**

To enable DM to conduct administrative reviews of violations issued under the Mine Safety Act and to guide the internal management of administrative review conducted by DM. This procedure does not create any right or benefit, substantive or procedural, enforceable at law by a party against the Commonwealth, DMME, its officers, or any person.

## **GENERAL**

1. The Mine Safety Act expressly provides for the appeal and administrative review of issued violations. The person to whom a Notice of Violation has been issued may appeal the issuance in writing within twenty days of receipt of the violation. Upon proper notice and standing, DM will conduct an informal conference pursuant to § 9-6.14:11 of the Administrative Process Act (APA). Should the parties agree to waive the informal conference or should the informal conference fail to dispose of the case by consent, DM will conduct a formal hearing pursuant to Administrative Process Act § 9-6.14.12.
2. The Mine Safety Act guarantees judicial review to any party aggrieved by and claiming unlawfulness of the administrative decision. This procedure governs administrative appeals prior to any judicial appeal.
3. This procedure is only intended to address the administrative review of violations issued under Mine Safety Act § 45.1-161.90 and does not concern certification, licensing, and closure decisions.

## **PROCEDURE**

### **1. REQUESTS FOR REVIEW**

#### **■ Accepting Initial Requests For Review**

- a. Persons seeking to appeal a Notice of Violation should mail or deliver a written notice of appeal to DMME offices in Big Stone Gap or Keen Mountain. Department personnel will only accept written requests to appeal a notice of violation. Persons making oral requests or inquiries should be instructed:

- (1) that written requests should be delivered or mailed to DMME offices in Big Stone Gap or Keen Mountain; (MSA §45.1-161.90 (D))
- (2) that written requests must be received within 20 calendar days from receipt of a notice of violation;
- (3) that an informal conference will precede a formal hearing unless waived by both parties; and
- (4) that a request to waive the informal conference should be submitted in writing and should be included in the initial written request for review.

- b. The person accepting the written request should:

- (1) immediately date and sign the request, sign any certified mail or other delivery receipt; and
- (2) call the Inspector Supervisor responsible for the area from which the appeal arises and forward him the request. If the appropriate Inspector Supervisor is not available, the persons accepting the written request shall call the Chief and forward him the request.

#### **■ Developing The Review**

- a. Upon receiving a written request, the Inspector Supervisor, as soon as possible, should:

- (1) verify that the appeal has been filed by the person to whom the notice of violation has been issued, hereinafter called the applicant; (MSA § 45.1-161.90 (D)).
- (2) verify that the applicant submitted the written request within 20 calendar days following the receipt of the notice of violation (MSA § 45.1-161.90 (D)). The twenty calendar days shall be computed in addition to the day on which the notice of violation was received. (§ 1-13) However, if the last day of the twenty day period should fall on a Saturday, Sunday, or legal holiday, a request for review can be submitted on the next day that is not a Saturday, Sunday, or legal holiday. (§ 1.13.3:1)

- b. If a request was not made by the person to whom a notice of violation was issued or that a request was not made within 20 calendar days:
  - (1) the Inspector Supervisor should:
    - (a) send a letter denying review on such grounds;
    - (b) file a copy of the letter in the case file; and
    - (c) notify the Chief by telephone or computer note and forward a copy of the letter to the Chief.
- c. If a request is not made by the person to whom the notice of violation was issued, but the 20-day appeal period has not expired, the Inspector Supervisor should:
  - (1) immediately call and orally notify the person that the appeal must be made by the person to whom the violation was issued;
  - (2) make a record of the telephone call in the case file; and
  - (3) notify the Chief by telephone or computer note.
- d. Upon receiving a valid request for review, the Inspector Supervisor, whenever possible within ten working days of the Department's receipt of the written request, should take one of the following course of action: (MSA § 45.1-161.90 (D))
  - (1) If neither party waives the informal conference (requesting we proceed directly to a formal conference), schedule the informal conference.
  - (2) If the applicant requests a waiver of the informal conference, either:
    - (a) consent in writing to a waiver of the informal conference and schedule a formal conference (See section 4); or
    - (b) deny the applicant's request to waive the informal conference, and schedule an informal conference, notifying the applicant in writing. Notice of the decision not to accept the request to waive the informal conference should be included in the letter to the applicant scheduling the informal conference. **NOTE:** In deciding whether to consent to the waiver of an informal conference, the Inspector Supervisor should consider factors such as: (i) the applicant's interest that will be affected by the agency's action; (ii) the risk that the applicant will be erroneously deprived of that interest based upon the use of informal proceedings; (iii) the probable value of the additional safeguards offered by a formal hearing; (iv) the Agency's interest in the hearing process, including the fiscal and administrative burdens associated with the waiver of an informal conference; and, (v) the likelihood that an informal conference will contribute to a satisfactory resolution.
- e. If an applicant did not request to waive the informal conference, but the Inspector Supervisor determines DM should request a waiver, the Inspector Supervisor should call and request the applicant's consent to a formal hearing; and

- (1) if the applicant consents to waive the informal conference, then schedule a formal hearing (See section 4 ); or,
- (2) if the applicant declines to waive the informal conference, then schedule an informal conference (See section 3).

## 2. INFORMAL CONFERENCE

### ■ Preliminary Preparation

- a. The Inspector Supervisor designated by the Chief to act as the Conference Officer should schedule an informal conference (if not waived) to take place whenever possible within 30 calendar days following the Department's receipt of the written conference request, at such time agreed upon by the applicant and DM. The meeting shall take place at the DM offices in Keen Mountain or Big Stone gap, or at a location agreed upon by the parties.
- b. The Conference Officer shall ensure that the applicant receives reasonable notice (which should be at least ten calendar days, unless the applicant and DM agree to less) of the informal conference. The Conference Officer shall send a certified letter to the applicant which details:
  - (1) the nature, date, time, and location of the conference;
  - (2) the applicant's right to appear in person or by other qualified representative;
  - (3) the specific code and regulation sections at issue;
  - (4) any contrary fact basis or information in the possession of the Department;
  - (5) the public's right to attend conferences; and
  - (6) the rights and restrictions of third-party participants.
- c. The Conference Officer shall promptly notify the Chief and the Deputy Director of the appeal.

### ■ Conferences

- a. The Chief shall assign DM personnel to attend the conference needed.
- b. The Conference Officer shall preside at the informal conference.
- c. In presiding the Conference Officer shall:
  - (1) accept oral and written statements presented at the conference;
  - (2) question persons at the conference as necessary to gather facts;
  - (3) prepare a written summary of the conference which details all issues raised and testimony presented; and
  - (4) maintain all notes, letters, and other records until the final decision is rendered.

■ Decisions

- a. The Conference Officer shall render a decision within 90 calendar days unless modified by mutual consent as provided in Administrative Process Act § 9-6.14:11(D) from the date of the fact-finding proceeding. The decision letter shall state:
  - (1) the final decision of the conference officer, including the general grounds upon which the decision is based; and
  - (2) the factual or procedural basis for an adverse decision, including references to specific code and regulation provisions where appropriate (§ 9-6.14:11 A).
- b. The Conference Officer shall prepare two duplicate originals of the final order. One original is to be filed in the case file as a public record, and one original is to be sent to the applicant. (§ 9-6.14:14)
- c. The full conference record shall be retained in the case file.

■ Notification

- a. The Conference Officer shall send the applicant the decision letter within five calendar days of the decision (§ 9-6.14:11. D)
  - (1) The signed decision letter shall be in writing.
  - (2) The decision letter shall be sent by certified mail, unless the decision letter is hand delivered in a manner evidenced in writing. (§ 9-6.14:14)
  - (3) If a decision is adverse, the decision letter shall inform the applicant of:
    - (a) the factual or procedural basis for the decision;
    - (b) the applicant's right to appeal; and
    - (c) the procedure for appealing the decision.
- b. The Conference Officer shall send copies of the decision letter to:
  - (1) the Chief;
  - (2) the Inspector who issued the original action;
  - (3) the Deputy Director; and
  - (4) the Assistant Attorney General representing DM

■ Post Conference Review

- a. The informal conference decision shall take affect only upon the applicant's signed acceptance of the decision letter. Upon such signature, DM's decision shall constitute final agency action.
- b. In the event that the informal conference fails to dispose of the case by mutual consent, DM shall conduct a formal hearing pursuant to Administrative Process Act § 9-6.14:12.

### 3. FORMAL HEARING

#### ■ Preliminary Preparation

- a. In the event that an informal conference was mutually waived or failed to dispose of a case by mutual consent, the Chief shall:
  - (1) assign a hearing officer after consulting with the DMLR Assessment Officer;
  - (2) forward copies of all relevant records and documents to the Assistant Attorney General, who will serve as counsel for DM;
  - (3) schedule a formal hearing to take place at the Department's Keen Mountain or Big Stone Gap offices, or at a location agreed upon by the parties, and at such time as agreed upon by the hearing officer and parties; and
  - (4) ensure that the applicant receives reasonable notice (which should be at least 15 calendar days unless the applicant and DM agree to less) of the formal hearing. The Chief shall send a certified letter to the applicant which details:
    - (a) the nature, date, time, and location of the hearing;
    - (b) the named party's right to appear in person or by counsel;
    - (c) the basic law or laws under which the Department contemplates its possible exercise of authority; (APA § 9-6.14:12 (B)).
    - (d) the matters of fact and law asserted or questioned by the Department, including references to specific code and regulation provisions where appropriate; (APA § 9-6.14:12 (B))
    - (e) the public's right to attend hearings; and
    - (f) the rights and restrictions of third-party participants.
- b. The Chief shall promptly forward the hearing officer:
  - (1) a copy of the hearing request;
  - (2) a copy of the notice of violation;
  - (3) a copy of the letter to the applicant scheduling the hearing; and
  - (4) any other relevant documents.
- c. The Chief shall promptly notify:
  - (1) the Inspector Supervisor;
  - (2) the Inspector who issued the violation;
  - (3) the Assistant Attorney General representing DM; and
  - (4) the Deputy Director.

■ Formal Hearings

- a. The Chief shall assign DM personnel to attend the hearing as needed.
- b. The hearing shall be conducted in accordance with APA § 9-6.14:12.
- c. The hearing officer shall preside over the hearing.(MSA §45.1-161.90(D)).
- d. The Chief shall ensure that a recorded and transcribed record of the hearing is made. A copy of the transcript shall be provided, upon request, to the applicant.
- e. The burden of proof shall be on the applicant. (APA § 9-6.14:12 (C))
- f. The hearing officer shall submit a written recommendation to the Department within 90 calendar days from the close of the record .[APA § 9-6.14:14.1(D)]

■ Decisions

- a. The hearing officer shall forward the record of the formal hearing to the Chief.
- b. The hearing officer shall send a copy of his recommendation to the Chief and to the applicant.
- c. The Chief may affirm, modify, or vacate the recommendation of the hearing officer. The Chief shall render a final decision within 30 days from the date that the agency receives the hearing officer's recommendation or as otherwise provided in APA § 9-6.14:11(E). The final decision order shall:
  - (1) justify the findings and conclusions of the Agency, and
  - (2) reflect the reasoned consideration of all material facts and issues.
- d. The Chief shall sign two duplicate originals of the final order. One original shall remain in the case file s a public record, and one original shall be sent to the applicant. [§ 9-6.14:14]
- e. The full conference record shall be retained in the case file.

■ Notification

- a. The Chief shall send the applicant the decision letter within five days of the decision. [§ 9-6.14:12 (H)]
  - (1) The decision letter shall be sent by certified mail, unless the decision letter is hand delivered in a manner evidenced in writing. [APA § 9-6.14:14]
  - (2) If a decision is adverse, the decision letter shall inform of:
    - (a) the factual or procedural basis of the decision; and
    - (b) the applicant's right to a judicial appeal.
- b. The Chief shall send copies of the decision letter to:
  - (1) the Deputy Director;
  - (2) the Inspector Supervisor (for routing to the Inspector); and
  - (3) the Assistant Attorney General representing DM.

■ Post Hearing Review

- a. The decision of the chief shall constitute final action by the agency. The Mine Safety Act does not give the applicant right to seek further review or reconsideration from the Department.
- b. The person accepting a “notice of appeal”, “petition for appeal”, or other relevant court documents should:
  - (1) immediately date and sign any certified mail or other delivery receipt;  
and
  - (2) forward the original to the Chief, and copies to the Director and Deputy Director.
- c. The Chief shall draft a transmittal letter listing the contents of the record. The Chief shall send the letter and administrative record to the appropriate Court Clerk’s office, the applicant’s attorney, and the Assistant Attorney General representing DM.